UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 130

Docket No. CH-3330-11-0732-I-1

Stephen W. Gingery,

Appellant,

v.

Office of Personnel Management,

Agency,

and

Department of the Treasury,

Intervenor.

December 11, 2012

Stephen W. Gingery, Macomb, Michigan, pro se.

Elizabeth Ghauri, Esquire, and Robin M. Richardson, Esquire, Washington, D.C., for the agency.

Eileen R. Jimenez, Esquire, Chicago, Illinois, for the intervenor.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction and as untimely filed. For the reasons set forth below, we VACATE the initial decision and DENY the appellant's request for corrective

action on the basis that he failed to meet the time limit for filing a complaint with the Secretary of Labor under 5 U.S.C. § 3330a(a)(2)(A).

BACKGROUND

Gingery v. Department of the Treasury, MSPB Docket No. CH-3330-08-0673-I-2

¶2 In January 2008, the appellant, a preference-eligible veteran with a service-connected disability rated at thirty percent or more, applied for a career-conditional competitive service position as a GS-5 Contact Representative (CR) with the agency's Internal Revenue Service (IRS) in Detroit, Michigan in response to Vacancy Announcement No. 08CN1-SBE0035-0962-05-MO. *Gingery v. Department of the Treasury*, 111 M.S.P.R. 134, ¶ 2 (2009). The vacancy announcement stated that applicants referred for selection may be scheduled to complete a Telephone Assessment Program (TAP) to evaluate customer service competence and that "passing the TAP is a requirement for selection." *Id.* The appellant was placed at the top of the highest category group on the certificate of eligibles generated for the vacancy announcement. *Id.* Accordingly, on March 18, 2008, the appellant took the TAP and completed the paperwork and fingerprinting for employment as a CR. *Id.*

¶3 On April 9, 2008, the IRS sent the appellant an automated e-mail notifying him that he did not pass the TAP and, therefore, would not be considered for employment as a CR. *Id.*, ¶ 3. On April 11, 2008, the IRS notified the appellant that it would be requesting a pass-over from the Office of Personnel Management (OPM). *Id.* On April 15, 2008, the IRS prepared a pass-over request based on the appellant's qualifications due to his failure of the TAP and forwarded that request to IRS Human Capital Officer Robert Buggs for his approval. *Id.* On July 25, 2008, while the pass-over request was awaiting Mr. Buggs's approval for submission to OPM, the IRS received the results of the appellant's fingerprint check, which revealed that, on July 16, 2008, the appellant had been sentenced by a district court for the state of Michigan to 12 months of nonreporting probation

and ordered to undergo an anger management assessment for numerous violations of law. *Id.*, ¶ 5. The IRS then prepared a pass-over request based on the appellant's suitability. *Id.* Mr. Buggs approved both pass-over requests and submitted them to OPM on August 28, 2008. *Id.* The IRS notified the appellant of both pass-over requests in letters dated August 27, 2008, which it sent to the appellant concurrent with the submission of the pass-over requests to OPM. *Id.*

¶4 Before the IRS submitted the pass-over requests to OPM, however, the appellant filed an appeal with the Board of his nonselection, MSPB Docket No. CH-3330-08-0673-I-I, naming the Department of the Treasury as the respondent agency and claiming that it violated his rights under the Veterans' Preference Act. *Id.*, ¶ 4. The appellant contended in that appeal that the IRS improperly disqualified him from consideration for employment based on his performance on the TAP without asking OPM for permission to pass over him and concurrently notifying him of the proposed pass-over in violation of 5 U.S.C. § 3318(b). *Id.*

¶5 On November 3, 2008, the administrative judge issued an initial decision that dismissed that appeal without prejudice to refiling once OPM issued a decision on the pass-over request. *Id.*, ¶ 7. In an April 21, 2009 Opinion and Order, the Board found that the administrative judge did not abuse her discretion in dismissing the appeal without prejudice, but it modified the administrative judge's refiling instructions to provide for automatic refiling upon notice from a party that OPM had ruled on the pass-over request or after the passage of 90 days. *Id.*, ¶¶ 12-14.

¶6 On November 20, 2008, OPM issued a pass-over decision in which it found that the Department of the Treasury had "proper and adequate reasons to object to [the appellant] that are sufficient to sustain [the] pass over request." MSPB Docket No. CH-3330-08-0673-I-2, Refiled Appeal File (0673-I-2 RAF), Tab 5, Subtab 4a. OPM approved the agency's request to remove the appellant's name from consideration on the basis of qualifications. *Id.*

¶7 By motion filed on June 26, 2009, the appellant informed the administrative judge that OPM had issued its pass-over decision and requested that his appeal be refiled. 0673-I-2 RAF, Tab 1. After considering the parties' submissions, the administrative judge dismissed the appellant's request for corrective action for failure to state a claim for which relief can be granted. The administrative judge found that, to the extent that the appellant claimed that OPM failed to consider his response to the agency's pass-over request and failed to afford him notice of its pass-over decision, those matters are not within the Board's VEOA jurisdiction because the appellant did not show he exhausted his remedies before the Department of Labor (DOL), and that, in any event, they were matters outside the control of the Department of the Treasury, the respondent agency in that appeal. *Gingery v. Department of the Treasury*, MSPB Docket No. CH-3330-08-0673-I-2, Initial Decision (0673 I-2 ID) (Aug. 24, 2009).

¶8 The administrative judge further found that, to the extent that the appellant challenged the IRS's requirement that all applicants pass the TAP after an initial qualifications determination was made, he did not present a nonfrivolous allegation that this procedure violated a statute or regulation pertaining to veterans' preference, implicitly concluding that the matter is outside the Board's VEOA jurisdiction. *Id.* The administrative judge found that the Board had VEOA jurisdiction over the appellant's claims that the Department of the Treasury violated his veterans' preference rights by not selecting him and by not holding a position for him while its pass-over request was pending before OPM. *Id.* at 4-5. Notwithstanding this jurisdictional finding, the administrative judge dismissed the appeal for failure to state a clam upon which relief can be granted, finding that the appellant could prove no set of facts in support of his VEOA claim that would entitle him to relief. *Id.* at 5. Specifically, the administrative judge found that, as verified by OPM in its pass-over determination, the appellant did not meet the selection criteria for the position. *Id.*

¶9 By final order dated March 23, 2010, the Board reopened the appeal for the limited purpose of finding that, although the administrative judge dismissed the appeal for failure to state a claim upon which relief can be granted, the correct disposition of the appeal was to deny the appellant's request for corrective action. *Gingery v. Department of the Treasury*, MSPB Docket No. CH-3330-08-0673-I-2, Final Order (Mar. 23, 2010), *aff'd*, 422 F. App'x 877 (Fed. Cir. 2011).

The instant appeal

¶10 As stated above, while the appellant's appeal in MSPB Docket No. CH-3330-08-0673-I-2 was pending before the Board, by letter dated November 20, 2008, OPM granted the Department of the Treasury's pass-over request. Initial Appeal File (IAF), Tab 1 at 115. The appellant claims that he filed a VEOA complaint with DOL concerning OPM's decision on April 4, 2009. *Id.* at 75-80. On July 29, 2009, the appellant informed the DOL of his intent to file a Board appeal. *Id.* at 74. This appeal, in which the appellant named OPM as the respondent agency, followed.[1]

¶11 In his appeal, the appellant asserted that OPM violated a statute and/or regulation relating to veterans preference when it granted the IRS's pass-over request. IAF, Tabs 1, 8. The administrative judge dismissed the appeal for lack of jurisdiction without a hearing, finding that the Board lacks jurisdiction over pass-over decisions. IAF, Tab 16, Initial Decision (ID) at 2. The administrative judge further found that the appellant failed to present evidence showing that DOL "received and attempted to resolve the appellant's complaint" and that he therefore had not proved that he exhausted his DOL remedies before filing his appeal. ID at 3. The administrative judge also found that the appeal was untimely filed. ID at 3-4.

[1] The Department of the Treasury intervened as a respondent in the instant appeal on review.

¶12 The appellant timely petitions for review. Petition for Review (PFR) File, Tab 1. OPM and the intervener Department of the Treasury respond in opposition to the petition for review. *Id.*, Tabs 7, 9.

ANALYSIS

¶13 The VEOA grants preferences to veterans who seek federal employment. 5 U.S.C. § 3330a. If the employing agency rejects the veteran's request for preference employment, the VEOA vests the veteran with the right to challenge that rejection before the Board. To establish Board jurisdiction over a VEOA appeal, an appellant must (1) show that he exhausted his remedy with DOL, and (2) make nonfrivolous allegations that: (i) He is a preference eligible within the meaning of the VEOA, (ii) the action at issue took place on or after the date that the VEOA was enacted, and (iii) the agency violated his rights under a statute or regulation relating to veterans preference. 5 U.S.C. § 3330a; *Jarrard v. Social Security Administration*, 115 M.S.P.R. 397, ¶ 7 (2010), *aff'd*, 669 F.3d 1320 (Fed. Cir. 2012); *Becker v. Department of Veterans Affairs*, 107 M.S.P.R. 327, ¶ 9 (2007).

¶14 To establish exhaustion, the appellant must show that he provided DOL with a summary of the allegations forming the basis of his complaint so that DOL can conduct an investigation. *See Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 9, *aff'd*, 445 F. App'x 347 (Fed. Cir. 2011). The purpose of this requirement is to afford DOL the opportunity to conduct an investigation that might lead to corrective action before involving the Board in the case. *See* 5 U.S.C. § 3330a(b)-(c); *Burroughs*, 115 M.S.P.R. 656, ¶ 9. The appellant has provided a copy of his VEOA complaint, including a fax cover sheet, IAF, Tab 1

at 75-80, but he did not submit a fax confirmation sheet showing that he actually transmitted the complaint to DOL.[2]

¶15 There is no dispute that the content of the appellant's complaint was sufficient to provide DOL with the opportunity to conduct an investigation. The administrative judge found, however, that the appellant failed to prove that the DOL "received and attempted to resolve" the complaint. ID at 3. In so finding, the administrative judge did not apply the correct legal standard. The statute anticipates that DOL will not always resolve VEOA complaints within 60 days, and it explicitly provides individuals with the means to pursue their rights in that event. Thus, the statute provides that, to satisfy the exhaustion requirement, the appellant must also show that he either received written notification of the results of DOL's investigation of the complaint or, if DOL does not resolve the complaint within 60 days, that he provided written notification to DOL of his intent to file a Board appeal. 5 U.S.C. § 3330a(d)(1)-(2); *Burroughs v. Department of the Army*, 116 M.S.P.R. 292, ¶ 10 (2011). Therefore, the appellant was not required to prove that DOL "received and attempted to resolve" his complaint. *Cf. Burroughs*, 116 M.S.P.R. 292, ¶ 9 (the administrative judge erred by finding that the appellant failed to prove DOL exhaustion on the basis that there was no evidence that DOL accepted or construed his complaint as a VEOA complaint; any decision DOL made not to process the appellant's claim as a VEOA complaint could not be attributed to the appellant). Instead, the statute requires only that the appellant show that he filed a VEOA complaint with DOL. 5 U.S.C. § 3330a(a), (d). Under the circumstances, we find that the appellant has submitted preponderant evidence showing that he satisfied this requirement. IAF,

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[2] In an email dated July 15, 2011, John Muckelbauer, Veterans' Employment Training Service, DOL, stated that it "appears," based on the appellant's correspondence, that the appellant filed a complaint on April 4, 2009, but that DOL had no record of having received it. IAF, Tab 1 at 71.

Tab 1 at 74. Indeed, the fact that the appellant later filed a notice of intent to appeal on July 29, 2009, supports his assertion that he filed an initial complaint with DOL on or about April 4, 2009. Accordingly, we conclude that the appellant established that he exhausted his administrative remedy with DOL.

¶16 We next address whether the appellant's written complaint to DOL was timely filed.[3] The statute requires that the complaint must be filed with the Secretary of Labor within 60 days after the date of the alleged injury to the veteran's rights. 5 U.S.C. § 3330a.[4] We find that the appellant's written complaint with the Secretary of Labor was untimely filed. The appellant states that he became personally aware of OPM's action concerning the pass-over request "some time after the January 6[, 2009] postmark on the envelope" that he received from OPM containing its decision. IAF, Tab 1 at 117, Tab 8 at 33. In any event, the appellant was aware of OPM's decision no later than January 15, 2009, because on that date he wrote a letter to OPM which makes reference to

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[3] In *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371 (2009), the Board, citing *Kirkendall v. Department of the Army*, 479 F.3d 830, 835 n.2 (Fed. Cir. 2007) (en banc), determined that a failure to meet the 60-day time limit for filing a DOL complaint under 5 U.S.C. § 3330a(a)(2)(A) is not a failure to exhaust administrative remedies that deprives the Board of jurisdiction over a VEOA claim. *Garcia*, 110 M.S.P.R. 371, ¶¶ 8-13. Instead, the Board held that, when an appellant files an untimely complaint with DOL and equitable tolling does not apply, the request for corrective action must be denied based on a failure to meet the time limit for filing a complaint with DOL set forth at 5 U.S.C. § 3330a(a)(2)(A). *Garcia*, 110 M.S.P.R. 371, ¶ 13. As discussed below, we find that equitable tolling does not apply in this case.

[4] Section 3330a provides:

> (a)(1)(A) A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to the veteran's preference may file a complaint with the Secretary of Labor.
>
> (B) A veteran described in section 3304(f)(1) who alleges that an agency has violated such section with respect to such veteran may file a complaint with the Secretary of Labor.
>
> (2)(A) A complaint under this subsection must be filed within 60 days after the date of the alleged violation.

that decision and requests that OPM reconsider it. IAF, Tab 1 at 111, Tab 8 at 33. The appellant contends that the time for filing his DOL complaint did not commence until March 27, 2009, the date upon which he received a response from OPM confirming that its earlier determination was final. IAF, Tab 8 at 33. We disagree. There is no indication that OPM's decision to grant the pass-over request was preliminary or otherwise subject to reversal. Thus, we find that the 60-day filing period set forth in section 3330a(2)(A) commenced no later than January 15, 2009. The deadline for filing the appellant's complaint with DOL was therefore March 16, 2009. *Cf. Jones v. Merit Systems Protection Board*, No. 2012-3114, 2012 WL 3871745, at *2-3 (Fed. Cir. Sep. 7, 2012) (unpublished decision) (finding that the administrative judge correctly determined that the appellant's utilization of an agency re-review process did not alter the date of the agency's nonselection and that the deadline for filing a VEOA complaint with DOL was 60 days after that date). Because the appellant states that he filed his complaint with DOL on or about April 4, 2009, the complaint was untimely filed by 19 days.

¶17 The 60-day filing deadline set forth at 5 U.S.C. § 3330a(a)(2)(A), however, is subject to equitable tolling, and an employee's failure to file a complaint within that 60-day period does not summarily foreclose the Board from exercising jurisdiction to review the appeal. *Kirkendall v. Department of the Army*, 479 F.3d 830, 835-44 (Fed. Cir. 2007) (en banc); *Roesel v. Peace Corps*, 111 M.S.P.R. 366, ¶ 8 (2009); *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, ¶ 10 (2009). The Supreme Court explained in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), that federal courts have typically extended equitable relief only sparingly and that the Court had allowed equitable tolling in situations where the complainant had actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant had been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *See Roesel*, 111 M.S.P.R. 366, ¶ 8.

¶18 Here, there is neither argument nor evidence that the appellant filed a defective pleading [5] within the statutory period or that he was "tricked" or "induced" by an agency representative into filing late. *Cf. Roesel*, 111 M.S.P.R. 366, ¶ 10 (rejecting the appellant's contention that his appeal should be subject to equitable tolling because he had reached a settlement with the agency in a complaint before the Equal Employment Opportunity Commission concerning the pertinent vacancy announcement, the agency allegedly breached the settlement agreement, but he delayed in filing a complaint with DOL because he "had been told [the agency] had impunity from following the law"). The appellant's decision to await OPM's response to his request for reconsideration does not establish a compelling justification for the filing delay warranting the application of equitable tolling.[6] Because there is no indication that the appellant pursued his remedy within the statutory period or that his failure to file a timely VEOA complaint with DOL was the result of misconduct, equitable tolling is inappropriate. *See Brown v. U.S. Postal Service*, 110 M.S.P.R. 381, ¶ 14 (2009).

¶19 Accordingly, the appellant's request for corrective action under VEOA is DENIED because he failed to meet the time limit for filing a complaint with the

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[5] A defective pleading may be one that does not satisfy the criteria for the pleading, but that nevertheless manifests an intention to do so. *Cf. Greco v. Department of Homeland Security*, 110 M.S.P.R. 135, ¶ 8 (2008) (finding that an incomplete Board appeal was a defective filing that would nonetheless be treated as timely filed).

[6] The Board's decision in *Gingery v. Department of the Treasury*, MSPB Docket No. CH-3330-08-0673-I-2, is not determinative because we deny corrective action on the grounds that the filing of the written complaint with the DOL in this case was untimely. Nonetheless, we note the independent basis in that case for rejecting the appellant's claims here which are based on the same facts. That is, as verified by OPM in its pass-over determination, the appellant did not meet the selection criteria for the position because he did not pass the TAP, which was required of all applicants referred for selection. 0673-I-2 ID at 5. The appellant's submissions in this appeal provide no basis for reconsidering this determination.

Secretary of Labor under 5 U.S.C. § 3330a(a)(2)(A).[7] In so holding, we distinguish *Waddell v. U.S. Postal Service*, 94 M.S.P.R. 411 (2003), where the Board held that it could address the merits of the appellant's VEOA claim despite the fact that he filed his DOL complaint beyond the deadline. Unlike the present case, in *Waddell* DOL recognized the timeliness issue, excused the appellant's lateness, and investigated the substance of the complaint.

ORDER

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).[8]

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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[7] In light of our disposition in this appeal, we need not decide whether the appellant's Board appeal was timely filed. Further, we have not reached the issues identified in the Board's May 25, 2012 Briefing Order, which primarily concern the scope of the Board's jurisdiction to adjudicate claims under statutes and regulations relating to veterans' preference. *See* PFR File, Tab 13. Finally, we have not considered the two documents that the appellant submitted for the first time with his petition for review. *See* PFR, Tab 1 at 40-66. The documents are not material to the issues in this appeal, and both were available prior to the close of the record below, but the appellant has not shown why, despite his due diligence, he could not have submitted them below. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

[8] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.